UVARAJAH KANASEVAN & ANOR.

v.

PENOLONG PENGARAH BURUH, BUTTERWORTH & ORS.

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMED JC
[ORIGINATING SUMMONS NO. 25-6-90]
24 JULY 1991

ADMINISTRATIVE LAW: *Judicial review - Certiorari and mandamus - Whether available to a party where there exists a right of appeal and no appeal is lodged - Discretion of Court - Exceptional circumstances - Extent of right to be heard - Whether labour officer should have 'cancelled' cases without hearing argument on issue of jurisdiction of labour officer.*

LABOUR LAW: *Labour officer - Whether has jurisdiction over issue of wages - Interpretation of collective agreement - Deemed to be an award - Claim for overtime wages pursuant to a collective agreement - Labour officer has jurisdiction in relation to issue of wages but not in relation to validity of a dismissal - Decisions in Nylex, Rajaretnam and Securicor - Interpretation of award or collective agreement is a matter for Industrial Court - Industrial Relations Act 1967, ss. 17, 33, 56.*

The applicants had claimed for over-time wages pursuant to a collective agreement entered into between the 1st and 2nd respondents (R1 and R2) on the one part and the Food Industries Employees' Union (the union) on the other. A senior labour officer (SLO) of the labour office held an inquiry wherein most of the evidence had been rendered. The matter was scheduled to be for continuation at which stage the parties were required to make further submission.

Prior to this continued hearing the SLO informed the applicants that the two cases were cancelled as he was of the opinion that a labour officer had no jurisdiction to hear the case (*Securicor's* case) and requested them to pursue the claims in the Industrial Court if they so desired.

This was the applicant's application for an order of *certiorari* to quash the SLO's decision and *mandamus* to direct him to hear and determine the two cases.

The issues were:

(a) whether judicial review was available where there was a right of appeal against the decision but no appeal was lodged;

(b) whether R1 had acted in breach of natural justice in summarily 'cancelling' the case without giving the parties the right to make a submission as to whether he had the jurisdiction to hear and determine the cases, and

(c) whether the *Securicor* case was properly decided and whether it was contrary to the decisions in *Nylex* and *Rajaretnam.*

Held:

[1] Judicial review of a decision is at the discretion of the Court. It can be available to a party even if there is a right of appeal against the decision and no appeal is lodged. However, it will only be made available in exceptional circumstances.

[2] The judgment in *Securicor* is not contrary to the Supreme Court judgment in *Rajaretnam* nor the High Court decision in *Nylex* as in *Securicor*, the learned Judge held himself bound by the Supreme Court decision in *Rajaretnam* that a labour officer has jurisdiction to hold an inquiry where the dispute is over wages only, but not where it involves the validity of a dismissal.

[3] Furthermore, the part of *Securicor*'s judgment which dealt with the issue of whether the labour officer's order contravened s. 33 of the Industrial Relations Act 1967 (the IRA), was not an issue which arose in either *Nylex* or *Rajaretnam*.

[4] Although the claim in this case was for wages, it was made pursuant to a collective agreement. By virtue of s. 17 of the IRA, the collective agreement is deemed to be an award. Therefore, as in this case, where a question arises as to its interpretation, the matter should have been referred to the Industrial Court under s. 33 of the IRA. A complaint of non-compliance of the award was also a matter for the Industrial Court.

[5] A labour officer has no jurisdiction to determine a claim, even though only for wages, where it involves the interpretation or compliance with an award, or a collective agreement. R1 did not commit any jurisdictional error in refusing to continue to hear and determine the two cases.

[6] R1 had not acted in breach of natural justice in summarily "cancelling" the case without hearing the parties on the issue of whether he had jurisdiction to hear and determine the cases. It was purely a matter of law. The right to be heard does not mean that no Court is entitled to decide on authorities not cited to it unless the Counsel for respective parties are given a chance to make their submissions regarding the authorities.

[7] In the circumstances this case was not a proper case where the Court should exercise its discretion to issue a writ of *certiorari* and *mandamus*.

[Application dismissed with costs.]

Cases referred to:
Government of Malaysia & Anor. v. Jagdis Singh [1987] CLJ (Rep) 110 ***(foll)***
Nylex (M) Sdn. Bhd. v. Alias bin Chek [1985] CLJ (Rep) 602 ***(cons)***
Rajaretnam a/l Palaniandy v. Amalgamated Properties Industries [1988] 2 MLJ 363 ***(cons)***

Legislation referred to:
Industrial Relations Act 1967, ss. 17, 33, 56

For the applicant - Mohideen Abdul Kader; M/s. Mohideen & Asamaley
For the 1st respondent - Muhamad Ideres bin Muhamad Rapee
For the 2nd and 3rd respondents - T.M. Varughese; M/s. T.M. Varughese & Co.

[Editor's note: The applicants' appealed to the Supreme Court on 11 July 1991 *vide* SCCA No. 1-28-91.]

JUDGMENT

Abdul Hamid Mohamed JC:

The applicants applied for an order of *certiorari* to remove into this Court and to quash the decision of Penolong Pengarah Buruh, Butterworth dated 21 August 1989 and for an order of *mandamus* to direct him to hear and determine the two labour cases *viz*. BW KB 219/86 and BW KB 222/87.

The applicants had claimed for over-time wages pursuant to Article 17 of the collective agreement entered into between the first and second respondents on the one part and the Food Industries Employee Union on the other part.

Article 17 of the said agreement provides:

Article 17 - Overtime

(a) Overtime is work performed at the prior request of the company outside the normal working hours applicable to the employees concerned and with the consent of the employee but such consent shall not be unreasonably withheld.

(b) Employees working on such overtime shall be paid at one and a half (1½) times the hourly rate of pay.

(c) Normal hourly rate shall be in accordance with the Employment Act.

Article 7 of the said agreement provides:

Article 7 Arbitration

Any dispute relating to the interpretation or implementation of this agreement shall unless settled by negotiation may be referred for arbitration in accordance with provisions of the Industrial Relations Act 1967 or such other law as may be in force.

The claims were made at the Labour Office, Butterworth. A senior labour officer held an inquiry in which he "recorded most of the evidence ... and part of the submissions the continuation of which was scheduled on 5 October 1989."

However, by a letter dated 21 August 1989, the first respondent informed the applicants' solicitors that the two cases were cancelled and requested them to pursue the claims in the Industrial Court if they so desired. He stated that the decision was based on the *Securicor Malaysia Sdn. Bhd. Johor Bahru v. Mohd. Lazi bin Katan,* High Court Johor Bahru Civil Appeal No. 16-4A of 1987 [1989] 2 CLJ (Rep) 440. In other words he was of the view that the decision of the High Court at Johor Bahru was binding on him and a labour officer had no jurisdiction to hear the case.

The first point is whether judicial review is available where there is a right of appeal against the decision and no appeal is lodged. A number of authorities were cited to me. However, I am of the view that it is sufficient for me to refer only to the Supreme Court decision in *Government of Malaysia & Anor v. Jagdis Singh* [1987] CLJ (Rep) 110. In that case, Hashim Yeop A. Sani SCJ (as he then was), who delivered the judgment of the Court, having referred to a number of authorities, said at p. 115:

A clear principle is reiterated here, that is, it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the Court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

In Re Preston was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.

In answer to the first question we would therefore hold that the discretion is still with the Courts but where there is an appeal provision available to the applicant *certiorari* should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

So, the question is whether there is such a case.

Encik Mohideen, Counsel for the applicants argued that the labour officer was wrong in saying that he had no jurisdiction to hear and determine the two cases. In other words, the labour officer was wrong when he thought that he was bound by the decision of Abu Mansor J in *Securicor* because that case was wrongly decided. Instead, according to Encik Mohideen, the labour officer should have followed *Nylex (M) Sdn. Bhd. v. Alias bin Chek* [1985] CLJ (Rep) 602 and *Rajaretnam a/l Palaniandy v. Amalgamated Properties Industries* [1988] 2 MLJ 363 SC.

In *Nylex*, the respondent, an employee of the applicant, filed a complaint with the Labour Office, Klang that his services had been terminated by the applicant without notice and claimed indemnity in lieu of notice and termination benefits. After considering the provisions of s. 69 of the Employment Act 1955, Harun Hashim J (as he then was) held that "the powers of the Director-General (including an Assistant Director) under s. 69(1) are limited to matters concerning wages only". The learned Judge therefore held that in the circumstances of that case, the Assistant Director had no jurisdiction to hold an inquiry under s. 69(1) of the Act.

Rajaretnam is a Supreme Court decision. Again the question was whether a labour officer may hold an inquiry under s. 69 of the Act where the dispute was whether the dismissal was without just cause or excuse. The Supreme Court agreed with the judgment of Harun Hashim J (as he then was) in *Nylex* and dismissed the appeal. That was in 1988.

In 1989, Abu Mansor J delivered his judgment in the *Securicor* case.

It should be noted that in *Securicor*, the respondent who was found to have committed a serious misconduct was dismissed by the appellant pursuant to a disciplinary action. The respondent lodged a complaint to the Kluang Labour Office under s. 69(1) of the Act. After an inquiry, the labour officer made an order for arrears of pay in the sum of RM485.

Before the learned Judge, it was argued, first, that the labour officer had no jurisdiction to hold the inquiry as the complaint arose from a dismissal for misconduct. The learned Judge held that he was bound by *Rajaretnam* **only if** the inquiry held by the labour officer was for the specific purpose of determining the validity of the dismissal. He held however that even though the complaint arose as a result of a dismissal, the order made by the labour officer was only in respect of arrears of wages.

It is not for me to say whether the learned Judge, on the facts of that case, had come to a correct decision or not, indeed it is not necessary for me to comment. What is clear is that the learned Judge held himself bound by the Supreme Court decision that a labour officer **has** jurisdiction to hold an inquiry where the dispute is over wages only, but not where it involves the validity of a dismissal.

In that sense, in my view it cannot be said that judgment is contrary to the Supreme Court judgment in *Rajaretnam* or for that matter the High Court decision in *Nylex.*

Perhaps, it should be noted here that in this case the claim is for wages only (overtime).

We now come to the second part of the judgment of Abu Mansor J in *Securicor*. It was argued by Counsel for the appellant in that case that the "Director of Labour" had no jurisdiction to make the order which he did because it contravened the provisions of s. 33 of the Industrial Relations Act 1967 as the order was made under Award 50 and it involved an interpretation of an award under s. 33 and non-compliance with an award under s. 56 of the Industrial Relations Act 1967.

This question did not arise in either *Nylex* or *Rajaretnam*. So, in my view, it cannot be said that the learned Judge's decision on this point is inconsistent with the said two judgments.

I agree with the view of the learned Judge in *Securicor* on this point.

In this case, the claim, though no doubt for wages, was made pursuant to Article 17 of the collective agreement.

It was not disputed that the collective agreement had been taken cognizance of by the Industrial Court. By virtue of s. 17 of the Act it is deemed to be an award. That being so, where a question arises as to its interpretation, the matter should be referred to the Industrial Court - s. 33. If there is a complaint that any of its terms is not complied with, again that is a matter for the Industrial Court - s. 56.

For the above reasons I agree with Abu Mansor J in *Securicor's* case that a labour officer has no jurisdiction to determine a claim, though for wages only, where it involves the interpretation or compliance with an award, or a collective agreement which is deemed to be an award. I am also of the view that this view is not inconsistent with the view expressed by the Supreme Court in *Rajaretnam* or by the High Court in *Nylex*, as this point did not arise in those cases and was not decided therein.

I am therefore of the view that the first respondent did not commit any jurisdictional error by refusing to continue to hear and determine the two cases. This ground fails.

The second ground which was put forward by Counsel for the applicant was that the first respondent had acted in breach of natural justice in summarily "cancelling" the case without giving the parties the right to make a submission whether he had jurisdiction to hear and determine the cases or not, whether *Securicor* was correctly decided and whether *Securicor* was contrary to *Nylex* and *Rajaretnam*. With respect, I do not think there is any merit in this argument. It is purely a matter of law. To agree with that proposition would mean that no Court is entitled to decide on authorities not cited to it unless Counsel for the respective parties are given a chance to make their submissions regarding the authorities. I do not think that the right to be heard goes that far.

In the circumstances of this case and on the principles stated by the Supreme Court in *Jagdis Singh's* case, in my judgment, this is not a proper case where the Court should exercise its discretion to issue a writ of *certiorari* and *mandamus*.

The application is dismissed with costs.

Also found at [1991] 3 CLJ 2956